Improving the Efficiency, Effectiveness and Fairness of the Process for Environmental Waste Approvals

A discussion paper prepared by a working group representing the Ministry of the Environment, Ontario Waste Management Association and Pollution Probe

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List of recommendations

What follows is a listing of the recommendations of the discussion paper. The location of each in the text is indicated.

2. Improving communications among the three primary sectors

2.1 Role of MOE

- It is recommended that MOE prepare and publish guidelines for EPA consultation. (page 9)

- It is recommended that MOE review the application form and guidelines for technical information to be supplied with an EPA application and revise to provide more precise instructions on information to be provided. (page 11)

- MOE should adopt a one window approach by designating one person as the contact person for the proponent and public on the application; that person should monitor the application as it proceeds through the MOE review process and provide the proponent and public with information on the status of the application when requested. (page 11)

- MOE should work to ensure continuity of staffing for each application. (page 12)

- MOE should develop a policy on access to information concerning waste approval applications. (page 12)

- An MOE representative, preferably the same one, should attend the first and subsequent public meetings to provide information on the approvals process and the standards the application must meet. (page 12)

- MOE should review existing consultation literature which is available to the public and proponent. New literature should be developed and made available if needed. (page 14)

2.2 Role of the proponent

- The proponent should undertake a comprehensive public consultation program which includes meetings with local elected officials, an initial public meeting and subsequent public meetings as required. (page 15)

- The proponent should designate one person to act as a liaison with other parties. (page 16)

- The proponent should use the one-window approach and not try to circumvent the system as long as deadlines are being met. (page 16)

- The proponent should fund an independent expert for two or three working days to provide information to members of the public on the approvals process. That individual should be chosen jointly by the interested citizen groups, the proponent and MOE. (page 17)

2.3 Role of the public

- The public groups (to the extent possible) should also designate one person to act as a liaison with other parties. (page 19)

- The public should also use the one window approach and not try to circumvent the system as long as deadlines are being met. (page 19)

- Liason representatives should ensure opportunity is provided for interested members of the public to meet privately with the independent expert and with MOE staff to discuss the application. (page 19)

2.4 Decisions on EAA designations and EPA hearings

- MOE should establish a 120-day deadline for making a decision on an EAA designation request. (page 20)

- MOE should review the criteria, method and time table for making a decision on an EPA hearing request. (page 20)

3. Introducing policy changes to an application under consideration

- The ministry should develop a policy governing the application of changes in standards, government policies or approvals decision-making procedures (hereafter referred to as "changes in the rules") to applications which are in the midst of the approvals process. The suggested new policy should address:

- *changes to existing standards set out in MOE policies, guidelines or regulations*

- *introduction of new standards set out in MOE policies, guidelines or regulations*

- *changes in existing or introduction of new government policies*

- *changes in the approvals decision-making process (pages 24-25)*

- The suggested new policy should explicitly state how changes in the rules will be applied to applications currently being processed. (page 25)

- Under this new policy a freeze on processing applications which have already been submitted while changes in the rules are developed should be the exception rather than the norm. (page 26)

- MOE should develop criteria governing the decision to freeze some applications; those criteria and the reasons for freezing a particular application should be made publicly available. (page 26)

- In cases of a freeze, MOE should provide an estimate of the time which will be required to implement new standards, government policies or approvals decision-making procedures. (page 26)

- As a general rule, applications which have already been submitted should continue to be processed while new standards, government policies or approvals decision-making procedures are developed; once a decision has been made, however, the new rules (which may or may not include a delayed implementation date) should apply to all applications, for which a hearing date has not yet been set. (page 27)

- If an application has been processed to the point that a hearing date has been set when new rules are introduced the application should, if the proponent wishes, proceed to the hearing; the Environmental Assessment Board can then decide on the application, bearing in mind the change of rules which has been made. (page 27)

- MOE should undertake an internal management review to ensure that changes in the rules are applied in the same manner and at the same time by officials in all regions. (page 27)

- MOE should ensure that the proponent and members of the public are fully informed of the way in which changes in the rules will be applied to existing applications. (page 27)

1. Introduction

This report is intended to stimulate discussion as a first step in consultative action by the Ontario government on two aspects of the present waste approvals process in Ontario. These are:

1. the three-way flow of communication among the pro ponent, the ministry and interested members of the public, and

2. the way in which changes in waste standards, ap proval procedures or government policy are applied during the course of any given waste application.

The discussion paper has been prepared by a working group representing the three sectors most directly involved in waste approval applications - government, and more specifically Ministry of the Environment (MOE), the waste industry, and environmental public-interest organizations - in the hopes that it will contribute to further improving the fairness and efficiency of the approvals process. The ad hoc group came together because of a shared recognition that the system was not functioning as well as it might and that all parties, including the government officials administering the system, the proponent seeking approval for a modified or new waste facility, and members of the affected public, were often frustrated and embittered. Members of the group who prepared this paper are listed in the Appendix.

All of the members of the group have first hand experience with the two issues set out above - failures of communication among the three major parties to an approval and confusion and uncertainty resulting from changes to the rules of the game during the life of a particular waste application. Such difficulties are symptomatic of larger problems which plague environmental, land-use and other approvals both in Ontario and in other jurisdictions. As population densities increase in Ontario, siting new or expanding existing facilities in a way which respects the rights of all - affected neighbors, proponents, the larger public interest and the natural environment - becomes increasingly difficult. At the same time, however, the task becomes increasingly important. Delays, confusions and

uncertainties in the approvals process reduce investor confidence and have direct consequences for Ontario's economic well-being; in the same way, to the extent that the system functions at sub-optimal efficiency we are that much less able to protect our shared environment. As the Ontario economy undergoes one of the most massive restructurings since Confederation, we must do all we can to ensure the efficiency and basic fairness of the approvals process.

This paper is concerned only with one portion of the total approvals process. Care has been taken not to duplicate the considerable planning effort which has taken place over the past few years in connection with revisions to the Environmental Assessment Act (EAA) process. Nor has the paper touched upon the integration of environmental and land-use planning approvals which were recently the subject of a background paper, from the Royal Commission on the Future of the Toronto Waterfront, and and are presently under review by the Commission on Planning and and Development Reform in Ontario, chaired by John Sewell .

A further attempt was made to keep the project focussed by resisting any temptation to examine the substantive nature of existing waste facility standards (defined as the requirements, whether set out in MOE policies, guidelines or developed on an individual basis, which must be met before an application will be given approval).

Instead, the project deals primarily with the waste approval process, and in particular that part of the process from the time a first public meeting is held to discuss a proposed waste approval application to the beginning of an EPA, EAA or joint board hearing. The process governing waste hearings was not considered. Thus the scope of this discussion paper begins with the first public meeting convened by a proponent to discuss a proposed application and ends with the date at which either the Ministry decides neither an EPA or EAA hearing will be required or, if a hearing is required, a date for such a hearing is set.

The group adopted the same three criteria for evaluating present and proposed approvals procedures as those set forth by the Environment Minister Ruth Grier in December, 1990, when she released the discussion paper titled Toward Improving the Environmental Assessment Program in Ontario. These are:

effectiveness: defined as the ability of the process to achieve its stated goals

efficiency: defined as achieving those objectives at the minimal cost to the proponent, government bodies and intervenors

fairness: defined as a process which is transparent to all and respects the inherent rights of all concerned, including the natural environment

It is hoped that this discussion paper contributes to improvements to the waste approvals process, as measured against those three criteria.

2. Communications

Waste approval applications almost always take place in an adversarial atmosphere simply due to the nature of the governing legislation, which provides for litigation before an administrative tribunal, and the different objectives of the parties. The proponent wants the application approved, in the quickest possible time, in substantially the form in which it was submitted. Members of the affected public often want the proposal to be either substantially modified or rejected completely. Ministry staff want to guard themselves against any charges of favoritism or of undertaking a less than fully rigorous, and therefore time-consuming, examination.

Nothing can be done to fully eliminate the adversarial nature of the process which flows from these competing objectives. Steps can be taken, however, to ensure that suspicions, fears and hostilities which are based upon a misunderstanding of the intentions or methods of other parties are kept to a minimum. Thus any modifications which improve communications, and thereby reduce friction and time and energy spent in acrimony, will lead to a more efficient process.

Communication amongst parties to a waste approval is complicated by two factors. First, each of the points of the triangle in the the three-way system - MOE; proponent; and public - contains a number of sub-components. These include for the ministry, the Regional office, Approvals Branch, Waste Management Branch, Waste Reduction Office, EA Branch and Minister's office. The proponent will be represented by both the various consultants working on the undertaking and the permanent staff, which may include both a regional and head office. Finally, the public will rarely speak with just one voice. Individuals living in the vicinity will often divide into several citizen groups while the established public interest organizations, such as Pollution Probe, may also participate in any given application.

A second complicating factor arises from the potential participation of other actors. These may be business competitors who participate in the process to protect their own competitive issues, the local or regional municipality or

or other provincial or federal government bodies. Figure 1, following, provides a simplified representation of the lines of communication amongst the parties to an approval application.

The section which follows, therefore, provides a discussion of impediments to good communication among all parties and makes recommendations for ways in which each of the major sectors can work to improve the process.

2.1 Role of the Ministry of the Environment

The primary MOE communications objective is to make sure that both the proponent and interested members of the public have a clear and complete understanding of (1) the standards which must be met for the proposal to gain approval; and (2) the process which will be followed in considering and making a decision on the application.

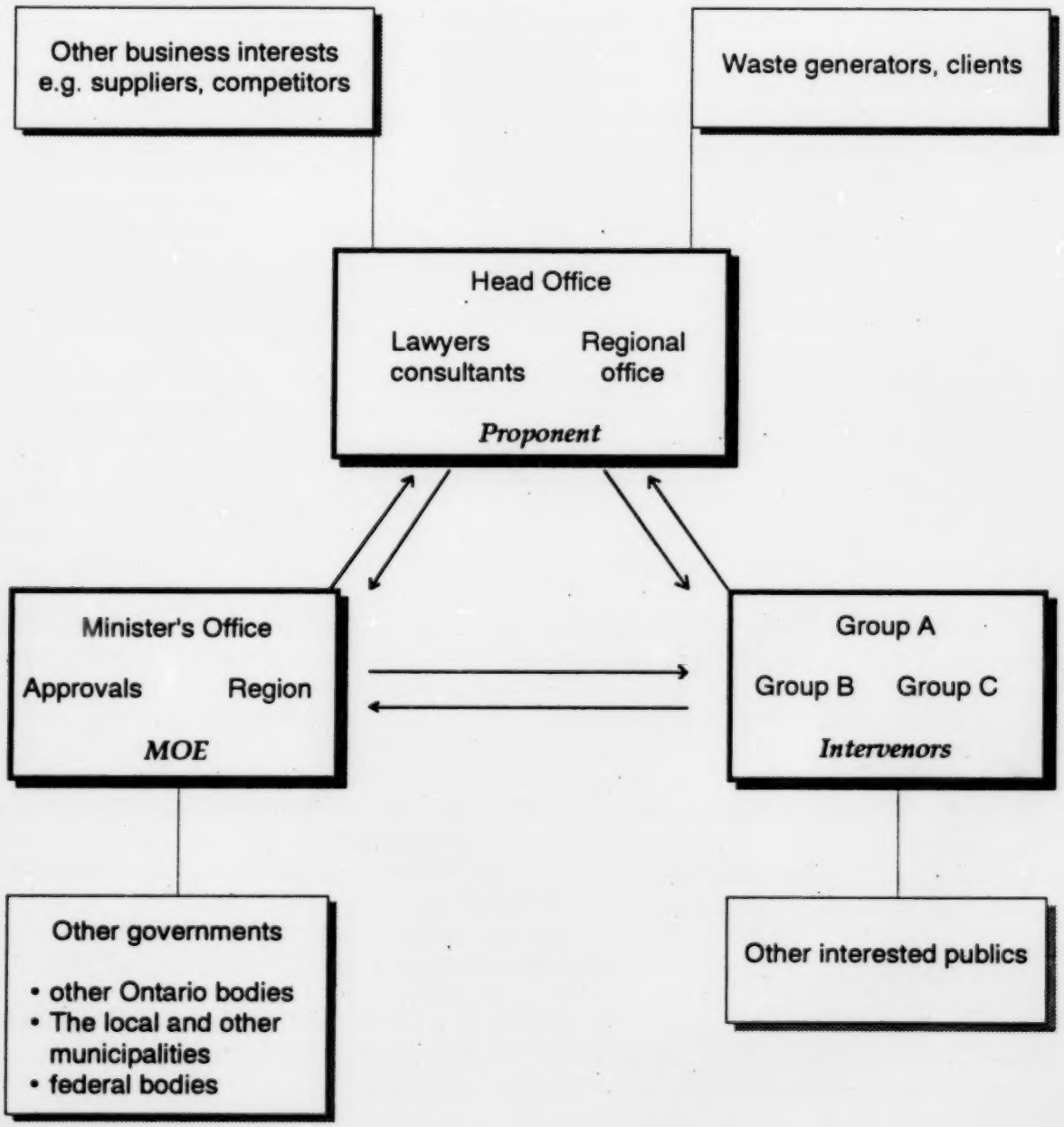
Other MOE communications tasks include the need to ensure efficient transmission of information within the ministry and to inform, as needed, those outside the ministry, including the proponent, members of the public, other government ministries and so on of the current status of the application. To a certain extent these tasks fall under the heading of internal MOE management and therefore are beyond the scope of this project. To the extent, however, that internal communications, or failures to communicate, have direct implications for the proponent and public they have been considered and are discussed below.

Communication with the proponent

While recognizing the difficulties of the ministry role, the working group identified several opportunities for strengthening communications between the ministry and the proponent. The first has to do with the way in which MOE advises a proponent on the means of going about public consultation. While written guidelines exist for an EAA planning process, no comparable assistance is available for a proponent in the case of an EPA application.

- **It is recommended that MOE prepare and publish guidelines for EPA consultation.**

Figure 1


Other business interests
e.g. suppliers, competitors
Waste generators, clients
Head Office
Lawyers
consultants
Regional
office
Proponent
Minister's Office
Approvals
Region
MOE
Group A
Group B
Group C
Intervenors
Other governments
• other Ontario bodies
• The local and other municipalities
• federal bodies
Other interested publics

After discussion, the working group reached the conclusion that the proponent is on occasion not told as clearly as possible what technical information should be provided with an EPA application or what format it should be in to facilitate government review. In particular, the waste Certificate of Approval application form is ambiguous and should be revised to provide more explicit instruction on the information to be supplied with the application.

- **It is recommended that MOE review the application form and guidelines for technical information to be supplied with an EPA application and revise them to provide more precise instructions on information which is to be provided.**

Another problem is a failure, on occasion, to fully inform the proponent (and, as discussed below, the public) of the current status of an application. This may well arise, very understandably, from a situation in which a given branch or department of the ministry is not aware of decisions made by other departments. It is suggested that this problem be addressed by designating one MOE staff person to be primarily responsible for liaison between the ministry and the proponent, public and other stakeholders.

- **MOE should adopt a one window approach by designating one personas the contact person for the proponent and public on the application; that person should monitor the application as it proceeds through the MOE review process and provide the proponent and public with information on the status of the application when requested.**

Communication with the public

As noted above, an important part of the ministry's role is to keep the public fully informed of the process being followed to consider the application. The one window approach referred to above, whereby the public would have one Ministry representative designated as their liaison point for obtaining information on the project, can only work effectively if, as much as possible, the same staff person fulfills that function during the life of each application.

- **MOE should work to ensure continuity of staffing for each application.**

For the one window approach to work, citizen groups must be able to obtain information on the application without delay. For example, calls from citizen groups (and others, for that matter) should be returned promptly - a three-week delay is unacceptable.

Information requests should be responded to or reasons given for not releasing information. There is some confusion within MOE concerning what information can or cannot be made public. Public accessibility should be the rule, not the exception. MOE needs to clarify its policy on this issue with its own staff and then announce the policy. Such a policy might be based on existing Freedom of Information procedures.

- **It is recommended that MOE establish a policy on access to information concerning approvals applications.**

An MOE representative should be present at the first public meeting to provide information on the application and process. This official should be trained in, and be comfortable with, public consultation work. The background information should include an overview of pertinent legislation and policies, a description of possible future processes, and an outline of responsibilities of MOE, the proponent and the public.

- **An MOE representative, preferably the same one, should attend the first and subsequent public meetings to provide information on the approvals process and the standards the application must meet.**

Another important step is to make sure that the literature on public consultation is up to date and informative. In the mid-1980s the ministry reviewed its public consultation programs which culminated in the publication of two reports: Public Consultation on Certificates of Approval: An Evaluation, prepared for MOE by Synergistics Consulting Ltd.,

(undated) and Public Consultation in Environmental Decision-making: A Review of MOE Activity, Report of the MOE Task Force on Public Consultation, May, 1986.

More recently the EAA review document titled Toward Improving the Environmental Assessment Program in Ontario, December, 1990, addressed the subject of public consultation under the Environmental Assessment Act.

A number of useful guides to public consultation have been prepared in recent years, including:

Policy on Public Consultation, MOE brochure, undated

Public Consultation: A Citizens Handbook, 1989 - produced by the Ontario Environmental Network (OEN) with MOE funding

Public Consultation: A Resource Kit for Ministry Staff, MOE 1989

A Citizens' Guide to Waste Management in the 1990s, Canadian Environmental Law Association (CELA), 1991.

The 1989 OEN handbook is not widely available, however, while the Resource Kit is limited to internal use. The MOE should review this material and revise or develop new material as needed. Such literature should always be available for distribution at introductory meetings called by the proponent. To be effective, such literature should be written in straightforward layperson's language and should wherever possible use anecdotes or practical examples to describe processes. The material should cover the following areas:

- pertinent legislation, including distinctions between EPA, EAA and other Acts
- relevant ministry policies, guidelines and regulations
- roles of various branches and offices within MOE
- responsibilities of MOE staff

- role of the EA Board
- the intervenor funding process
- public participation rights, including the right to request a designation under the EAA and criteria used by MOE in considering that request
- an outline of most likely timelines
- a glossary of waste approvals terminology
- **MOE should review existing consultation literature which is available to the public and proponent. New literature should be developed and made available as needed.**

2.2 Role of the proponent

Although there are no requirements for public consultation specified in the Environmental Protection Act, a significant amount of consultation is advisable and expected by the ministry. The proponent must be able to demonstrate that he or she has identified all of the concerns of the public and other stakeholders and has satisfactorily addressed those concerns before the proposal will be accepted by MOE. However, there are currently no written guidelines for EPA consultation and the amount and type of consultation varies considerably from project to project. In the absence of written policies or guidelines, public consultation requirements are largely determined by the local government which has jurisdiction over such aspects as land-use zoning approvals for the proposed project and the MOE officials who review the application. The problem is that such MOE procedures may vary from region to region. As noted above, in the interest of making the approvals process more transparent and fairer to both proponents and stakeholders, written guidelines for EPA consultation should be developed by the ministry.

Such guidelines would provide public interest groups with the information they need to effectively participate in the process. In addition, written guidelines would make the process less subject to negotiations between the proponent and MOE staff. The three parties, the public, proponent and MOE, would all know what is expected of each and could plan accordingly.

- **The proponent should undertake a comprehensive public consultation program which includes meetings with local elected officials, an initial public meeting and subsequent public meetings as required.**

Although such guidelines do not yet exist, the proponent should carry out a comprehensive public consultation program. This should include such steps as the following:

1. Meet with local officials, including the mayor and council members, soon after a candidate site has been selected. For most waste management projects the proposed site will require rezoning or other form of site-specific approval. Agree with local officials on the procedure for obtaining such approvals and a schedule for public meetings.

2. Invite the public to attend an initial information meeting by placing notices in local newspapers and radio stations. Interested parties that have been identified up to that point should be contacted directly and invited to attend the meeting. Arrange to have representatives of the local municipality and the MOE attend the meeting. At the meeting, present an overview of the proposed undertaking that includes:

- the rationale for the facility or change in operation
- the qualifications and experience of the proponent
- the types and quantities of wastes that will be processed at the facility
- a description of the technology or process that will be used

- the operating capacity (maximum annual throughput)

- the area that will be served

- the potential impact on neighbors and the risks to th environment as a result of traffic, noise, dust, odors an discharges of contaminants to the air, surface wate groundwater or soil; and

- the impact on land use in the neighbourhood of the facilit

It is suggested that the proponent also maintain staff con tinuity on the application and also comply with the spirit o the one-window approach. If the proponent maintain liaison with the MOE contact person but also attempts t maintain lines of communication with other MOE staff, such as the Minister's office or Regional office, confusion wi ensue.

- **The proponent should designate one person to act a a liaison with other parties.**

- **The proponent should use the one window approac and not try to circumvent the system as long a deadlines are being met.**

Under the provisions of the Intervenor Funding Project Act the proponent is required to pay the costs of legal an consulting staff hired by intervenors at a hearing before th Environmental Assessment Board. The limit on such cost is decided by an intervenor funding panel established by th Board. The Canadian Environmental Defence Fund repo titled Intervenor Funding and the Intervenor Funding Projec Act in Ontario, May 1991, has recommended that the Boar "consider using a staged funding process, particularly fo cases that are complex and lengthy, to cover costs incurre **before** the funding hearing".

In a similar manner, the working group recommends tha the proponent provide some funding early in the process t allow citizen groups to benefit from the advice and experi ence of independent experts during the initial stages of th

approvals process. These advisers should neither represent the ministry nor the proponent, and should be able to explain the general nature of the process to the public. They would not be intervening on behalf of the public, but rather answering the many questions that citizen groups normally have in the confusing early stages of waste approvals. They should, for example, be able to connect such groups with environmental organizations, make them aware of information sources and alert them to possible pitfalls. Such advisers should be available for evening meetings in the community.

The purpose of bringing such a person into the process in the early stages is to provide citizen groups with their own sources of information about the process and thereby reduce cynicism and distrust by not forcing them to rely exclusively on MOE and the proponent, and generally to assist the three parties in working together. This is very different from the later process of hiring counsel and experts under the IFPA, in which the purpose of the experts is to assist citizens at a hearing. For that reason, the working group concluded that the purpose of mutual trust could best be served if all three parties were included in the process of selecting such an individual.

- **The proponent should fund an independent expert for two or three working days to provide information to members of the public on the approvals process. That individual should be chosen jointly by the interested citizen groups, the proponent and MOE.**

2.3 Role of the public

Members of the public are currently almost exclusively in a reactive mode with regard to waste management approvals. Neighborhoods are often taken by surprise when plans for new or expanded waste management facilities are first announced. They generally receive their first information about the proposal from the proponent, without being familiar with the terminology, the legislative or policy context or the role of any of the players.

It should be remembered that the goals and desires, and more importantly the available resources, of the local public may be quite different from those of either the ministry or the proponent. Both the ministry and proponent are able to devote staff and financial resources to the process. However, local citizens who wish to participate in the planning process must do so on a volunteer basis and inevitably find the initial information- gathering process to be very arduous, which means there is a lopsided relationship between citizens and the other two corners of the triangle in the earliest stages.

Citizens typically begin their involvement lacking the most basic aids. They have no organizational structure, no contacts with other groups or independent experts, no government telephone directories and have available only their limited volunteer time. The limited amount of public information material produced by the ministry does not provide adequate guidance, and in any case it is often unavailable at meetings or regional offices. Ministry staff are also frequently absent at initial public meetings and are hard to reach by phone. Fragmented responsibilities in the Environment Ministry and high staff turn over rates mean that citizens are forced to deal with numerous ministry staff over the course of an approvals application process.

Understandably, local citizens try to use their limited volunteer time as efficiently as possible and because they see no clear credible process they often decide to go directly to the top. Unfortunately, letters to the Minister tend to require months for a response and alienate staff at regional offices. Phone calls to the Minister's office will access only the same information that is available at the local office and will swamp the Minister's staff with a multitude of small concerns.

A problem may arise if representatives of MOE or the proponent are given different messages by different representatives of a citizen group. This can be addressed by attempting, to the extent possible, to have one person in the group act as the liaison link with others.

- **The public groups (to the extent possible) should also designate one person to act as a liaison with other parties.**

For the one window system to work, the public, as well as proponents, should abide by its procedures.

- **The public should use the one window approach and not try to circumvent the system as long as deadlines being met.**

As well as meetings amongst all parties, citizen groups may wish to meet without the proponent present.

- **Liaison representatives should ensure opportunity is provided for interested members of the public to meet privately with the independent expert and with MOE staff to discuss the application.**

2.4 Decisions on EAA designations and EPA hearings

During the course of an EPA application, it is likely that the ministry will have to make decisions on two requests made by members of the affected public - a request that the Minister require the application to obtain Environmental Assessment Act, as well as Enviromental Protection Act approval and a request that the application be considered at a public hearing before the Environmental Assessment Board. For some applications, such as a municipal waste site serving more than 1500 people, an EPA hearing is mandatory. In other cases, however, the Director of Approvals has the power to order such a hearing.

There is the potential for confusion and uncertainty surrounding both issues. This may arise for either of two reasons: (1) the criteria used by the minister or director in deciding on either request may not be readily apparent to all involved; and (2) there may be a considerable delay between the time that either request is made and the time that a decision is made. The application is held in limbo during that time, with the proponent, public and ministry staff uncertain as to what procedure will be followed to complete the decision-making process. That problem is compounded if the method used by the minister or director in responding to such requests is not clear.

The working group is in agreement with the December 1990 EAA discussion paper recommendation for a deadline on EAA designation requests.

- **MOE should establish a 120-day deadline for making a decision on an EAA designation request.**

The working group was less certain that a similar deadline should be established for an EPA hearing request. It was felt that this issue needed a more detailed examination.

- **MOE should review the criteria, method and time table for making a decision on an EPA hearing request.**

3. *Introducing changes in standards or procedures to an application under consideration*

As set out above, the subject of this discussion paper is limited to (1) improving communications among the parties and (2) introducing changes in the rules (defined below as including standards, approvals decision-making process and government policy) to a particular waste application while it is in the process of being considered. The first issue, communications during the public consultation process, has been the subject of considerable attention in Ontario during the past decade and the suggestions advanced here build upon that work.

Such is not the case, however, with the latter topic. Although the methods and requirements of environmental regulation have changed considerably over the past two decades, no attention has yet been paid to the issue of how we can ensure that such changes can be made without impairing either the efficiency or fairness of the process for applications which are already under consideration. The discussion which follows, therefore, is necessarily somewhat tentative. It is felt that this discussion paper will have achieved its purpose in this area if it simply defines the problem more clearly than has been done to date, regardless of the value of the specific suggestions for change which have been advanced.

3.1 The problem

Prior to passage of the Waste Management Act in 1970, which was incorporated in the Environmental Protection Act in 1971, waste management was regulated only by zoning bylaws, public health bylaws and air pollution controls on burning of waste. Part V of the EPA established a comprehensive regulatory system for waste collection and disposal which has been extensively modified ever since it was first established. Standards governing the design and operation of hazardous and solid waste landfills have been progressively tightened; the manifest system and the Dangerous Goods Transportation Act requirements governing transportation of hazardous waste have been introduced; generators of hazardous waste have been required to register with MOE; EAA has been extended to cover virtually all private and public disposal applications while the procedures and requirements of the act have been further developed both by Board decisions and the consultative review of the act which was initiated in 1987 and is expected

to soon result in amendments to the act; a review of biomedical waste procedures has been initiated; a policy decision has been made by the Ontario government to not approve any future solid waste incineration applications; and finally, Bill 143, the Waste Management Act has been introduced by the Minister in the Legislature.

There is no reason to expect that this process of continual changes to the rules of the game is going to cease or slow down during the coming decade. Scientific discovery, technological change and business development are continually introducing both new environmental safeguards and new threats to ecological health, while at the same time public demands and expectations for health and environmental protection are continually increasing. Standards and procedures governing waste approvals will, as a result, inevitably continue to evolve and change.

What does this mean for any one particular waste application? Even what may seem to be a relatively minor application, such as a change in the service area of a landfill Certificate must go through a number of steps - initial public consultation; a decision by the ministry as to whether it will be exempted from EAA consideration; if so, a further decision as to whether an EPA public hearing will be held; if required, the hearing itself; and, finally, issuance by Approvals Branch of the amended certificate. The average time for such a process is likely to be measured in years, not months, while at the other end of the spectrum the longest application process to date, the proposed Ontario Waste Management Corporation hazardous waste facility, will likely have taken close to fifteen years by the time it has gone through the full planning and approvals process. Because of the time required for the process, the rules governing any given application are almost certain to change between the time that the proponent first begins planning to the time that a final decision on approval is made on the application.

This leads to a variety of problems. From the proponent's perspective, such changes in the rules will result in the additional time and expense required to complete further

studies and will also increase the uncertainty of the eventual outcome. This in turn may have implications for financing and other aspects of the proposed initiative. For the public, such changes add confusion to what is already a complex and difficult to understand process.

A further problem arises from the traditional way in which MOE has introduced such changes. Ideally, the ministry would make it clear to all concerned that the old rules apply up to such and such a date and that the new rules will become effective on the following day. In practice, however, ministry officials begin applying new rules to applications they are processing while the rules are still being developed or they put the application on hold pending a final decision on the rule change. In either case the result is confusion for both the proponent and interested parties and a lessening of the efficiency of the process. There is also a danger that, due to failures in internal communications or for other reasons, ministry officials in one part of the province will begin applying new rules while those in another part are still applying the old ones.

Thus it would seem that there are several distinct problems which need to be addressed. These are:

1. the additional time and expense borne by the propnent, the public and MOE

2. the danger of discretionary application of different rules by different officials

3. the additional difficulty for the public in participating in the approvals process when the rules have been changed with no explicit public statement to that effect by MOE.

Before moving on to discuss the substance of the policy recommended above, it is useful to define more precisely what is meant by the concept of changes in the rules of the game. For purposes of this discussion, changes in rules can come about through changes in any one of the following three areas:

1. standards for waste facility design and operation, whether they be expressed in guidelines which form the basis for Certificate conditions or in regulations; changes in such standards include both introduction of new standards where none previously existed and changes in existing standards;

2. changes in the decision-making process, such as the 1987 announcement by the Minister that EAA approval would be required for all private waste facilities over a certain size;

3. changes in government policy, such as the 1991 announcement by the Minister that no further approvals would be given for municipal solid waste incineration.

Nobody would suggest that these problems be addressed by simply freezing the rules of the game. Successive Ontario governments have responded to a clearly articulated public demand by continually upgrading environmental protection regulations and requirements and that process will obviously continue. The answer, therefore, is to develop an explicit MOE policy setting out the way in which such changes will be applied to applications which are currently under consideration.

The ministry should develop a policy governing the application of changes in standards, government policies or approvals decision-making procedures (hereafter referred to as changes in the rules) to applications which are in the midst of the approvals process. The suggested new policy should address:

- **changes to existing standards set out in MOE policies, guidelines or regulations;**

- **introduction of new standards set out in MOE policies, guidelines or regulations;**

- **changes in existing or introduction of new government policies;**

- **changes in the approvals decision-making process.**

The suggested new policy should explicitly state how changes in the rules will be applied to applications currently being processed.

3.2 Suggested approaches

What follows is discussion of options for addressing each of the three problems set out above.

Additional time and expense borne by the proponent, the public and MOE

This problem of additional time and expense has two components, as set out above: if rules are changed but the application proceeds, additional studies and changes in plans must be done to meet the new requirements; if the process is put on hold while new rules are developed, the proponent and public suffer from time delays and uncertainty.

The normal practice at present within the ministry is to put applications on hold while new rules are being developed.

The issue raised by the first problem is whether some applications, which are in progress through the process at the time a decision is made on new rules, should be allowed to complete the decision-making process under the old rules. For instance, a policy might state that any application for which a Board hearing date has been set will proceed without the requirement of changes to the application to meet the new regulatory requirements.

The issue raised by the second problem is whether the ministry should introduce any limits on the time during which processing of an application will be deferred pending changes in the rules.

The working group identified the range of options as:

- freeze all applications when begin developing new policy or changing policy and keep freeze until policy (or change in policy) is put in place;

- let all applications proceed but then apply new rules or changed rules to allapplications regardless of where they were in the process, perhaps with a lead-in period, i.e. a deferred implementation date;

- let proceed and then apply, as in #2 above, but do not apply to those which have already reached a particular point in the process, such as establishment of a hearing date.

There was agreement that the first option, which is now the implicit policy, should only be followed in exceptional cases.

- **Under this new policy a freeze on processing applications which have already been submitted while changes in the rules are developed should be the exception rather than the norm.**

Examples of such exceptional cases, considered by the working group, included the following: 1. the policy being developed may result in a complete ban placed on the activity applied for; 2. the policy being developed has resulted from introduction of significant new information about the activity applied for; or 3. there is no doubt that the new policy can be implemented quickly, defined as within three months.

The group agreed that in cases such as these, when a freeze might be justified, the criteria of fairness and transparency require that the ministry explicitly state what it is doing and why.

- **MOE should develop criteria governing the decision to freeze some applications; those criteria and the reasons for freezing a particular application should be made publicly available.**

- **In cases of a freeze, MOE should provide an estimate of the time which will be required to implement new standards, government policies or approvals decision-making procedures.**

The group agreed that the second option, set out above, should be the norm.

- **As a general rule, applications which have already been submitted should continue to be processed while new standards, government policies or approvals decision-making procedures are developed; once a decision has been made, however, the new rules (which may or may not include a delayed implementation date) should apply to all applications for which a hearing date has not yet been set.**

The only case in which an application should be allowed to proceed, in the opinion of the working group, is that in which a hearing date has been set. This is because the group felt that as much as possible new rules should apply to all applications. If a hearing date has been set, the Board itself has the option of applying the new rules to the application which is before it and the proponent has the option of explaining at that time what steps it can take to meet the new rules.

- **If an application has been processed to the point that a hearing date has been set when new rules are introduced the application should, if the proponent wishes, proceed to the hearing; the Environmental Assessment Board can then decide on the application, bearing in mind the change of rules which has been made.**

Danger of discretionary application of different rules by different officials

The working group agreed that this was an internal management issue which should be addressed by MOE.

- **MOE should undertake an internal management review to ensure that changes in the rules are applied in the same manner and at the same time by officials in all regions.**

Additional difficulty for the public

The final recommendation of the working group is that steps should be taken to minimize the confusion which such changes in the rules cause for members of the public who are participating in the process.

- **MOE should ensure that the proponent and members of the public are fully informed of the way in which changes in the rules will be applied to existing applications.**

4. Conclusion

As can be seen, the group of representatives from the waste industry, MOE and the environmental sector were able to reach a considerable degree of consensus in defining the two problems addressed and advancing some suggestions for their resolution. It is hoped that this discussion paper will now stimulate a broader discussion among the different sectors, perhaps following the standard workshop format, which in turn will act as a prelude to action by the ministry to address the issues which have been the subject of discussion here.

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